Sim Seoh Beng & Anor v Koperasi Tunas Muda Sungai Ara Bhd

COURT OF APPEAL (KUALA LUMPUR) — CIVIL APPEAL NO P02-7-94
SHAIK DAUD, GOPAL SRI RAM AND VC GEORGE JJCA
25, 27 AND 28 JANUARY 1995

Civil Procedure *— Injunction — Interlocutory injunction to restrain co-operative society from enforcing decision to suspend plaintiffs — Setting aside — Injunction obtained before amendments to O 29 — Whether injunction subject to amended O 29 and thus had lapsed after 14-days — Whether O 29 applies retrospectively — Rules of the High Court 1980 O 29 r 1(2B)*

Statutory Interpretation *— Retrospective operation — Statutes dealing with substantive rights — No retrospective effect unless clearly indicated in statute*

The appellants, who were members of the respondent society, received a letter from the respondent stating that they had been suspended from their membership of the respondent's board and that they could make a representation in respect of their suspension at the general meeting of the respondent on 14 March 1993 ('the general meeting'). On 5 March 1993, the appellants took out a writ claiming, inter alia, for a declaration that their suspension was invalid and obtained an ex parte interlocutory injunction restraining the respondent from reporting the appellants' suspension or enforcing it at the general meeting. The respondent applied to set aside the ex parte order and the judge allowed the application on the ground that the injunction had lapsed by effluxion of time by virtue of the retroactive effect of O 29 r 1(2B) of the Rules of the High Court 1980 ('the RHC') which came into effect on 1 October 1993. Order 29 r 1(2B) states that an interim injunction obtained on an ex parte application shall automatically lapse at the end of two weeks from the date on which it was granted unless sooner revoked or set aside. The appellants have appealed. The issue was whether O 29 r 1(2B) applied retrospectively.

Held, allowing the appeal:

(1) The judge had dissolved the injunction on a pure point of law. Therefore, an appellate court was in as good a position as the judge to decide upon the matter with no compulsion to defer to an exercise of discretion based upon evidential material.

(2) In order to determine whether a written law is prospective or retrospective, the court must first ascertain whether it would affect substantive rights if applied retrospectively. If it would, then, prima facie that law must be construed as having prospective effect only, unless there is a clear indication in the enactment that it is in any event to have retrospectivity. The converse is true where the written law does not affect substantive rights.

(3) The amendments introduced to the RHC by Gazette Notification PU(A) 364/93 should not be construed as retrospective provisions. When the appellants obtained the ex parte injunction, they had a legitimate expectation that their injunction would continue until set aside on the merits and that it would not lapse by mere effluxion of time. In the instant case, to give O 29 r (1)2B retrospective effect would result in the destruction of the right protected by the injunction.

[Bahasa Malaysia summary

Perayu, yang merupakan ahli-ahli persatuan responden, telah menerima sepucuk surat daripada responden yang menyatakan bahawa mereka telah digantung daripada keahlian mereka di dalam lembaga responden dan bahawa mereka boleh membuat representasi berkenaan dengan penggantungan mereka pada mesyuarat agung responden pada 14 Mac 1993 ('mesyuarat agung itu'). Pada 5 Mac 1993, perayu telah mengeluarkan suatu writ dan menuntut, antara lain, sebuah deklarasi bahawa penggantungan mereka tidak sah dan telah mendapat suatu injunksi interlokutori ex parte untuk menyekat responden daripada melaporkan penggantungan perayu ataupun menguatkuasakannya di mesyuarat agung itu. Responden telah memohon untuk mengetepikan perintah ex parte itu dan hakim telah membenarkan permohonan itu atas dasar bahawa injunksi itu telah luput masa disebabkan kesan kebelakangan A 29 k 1(2B) Kaedah-Kaedah Mahkamah Tinggi 1980 ('KMT itu') yang telah berkuatkuasa pada 1 Oktober 1993. Aturan 29 k 1(2B) menyatakan bahawa sesuatu injunksi interim yang diperolehi atas permohonan ex parte akan luput secara automatik pada akhir masa dua minggu daripada tarikh bila injunksi itu diberikan kecuali jika ia dibatalkan atau diketepikan terlebih dahulu. Perayu telah membuat rayuan. Isunya sama ada A 29 k 1(2B) berkesan secara kebelakangan.

Diputuskan, membenarkan rayuan itu:

(1) Hakim telah membubarkan injunksi itu semata-matanya atas perkara undang-undang. Oleh itu, sesuatu mahkamah rayuan berada dalam kedudukan yang sama baik seperti hakim itu untuk memutuskan perkara itu dan tidak terpaksa mengikut penggunaan budi bicara hakim berdasarkan keterangan yang ada.

(2) Untuk menentukan sama ada sesuatu undang-undang bertulis itu berkuatkuasa secara prospektif ataupun kebelakangan, mahkamah mestilah terlebih dahulu menentukan sama ada ia akan menjejaskan hak substantif jika digunakan secara kebelakangan. Jika ya, jadi, prima facie undang-undang itu mesti ditafsirkan sebagai mempunyai kesan prospektif sahaja, kecuali terdapat tanda yang jelas di dalam enakmen itu bahawa ia bagaimanapun akan mempunyai kesan kebelakangan. Keadaan sebaliknya benar di mana undang-undang bertulis itu tidak menjejaskan hak substantif.

(3) Pindaan yang diperkenalkan kepada KMT itu oleh PU(A) 364/93 tidak seharusnya ditafsirkan sebagai peruntukan kebelakangan. Apabila perayu mendapatkan injunksi ex parte itu, mereka mempunyai jangkaan sah bahawa injunksi mereka itu akan berlanjutan sehingga ia diketepikan atas merit dan bukan bahawa ia akan luput kerana luput masa. Di dalam kes ini, jika A 29 k (1)2B diberi kesan retrospektif, akibatnya ialah hak yang dilindungi oleh injunksi itu akan dimusnahkan.]

Notes

For cases on injunctions, see 2 *Mallal's Digest* (4th Ed, 1994 Reissue) paras 1425–1725.

For cases on the retrospective operation of statutes, see 11 *Mallal's Digest* (4th Ed) paras 1402–1407; [1989] Mallal's Digest 1481.

Cases referred to

Bank of America National Trust and Savings Association v Chai Yen [1980] 1 MLJ 198 (refd)

Dosabhai Ardeshir Cooper, Re (1950) 52 Bom LR 625 (refd)

Fuld, In the Estate of (No 3) [1968] P 675; [1965] 3 All ER 776; [1966] 2 WLR 717 (refd)

Gardner & Co Ltd v Cone & Anor [1928] All ER 458 (refd)

Jeou-Shun Industrial Co Ltd v Shuang Hor Enterprise (M) Sdn Bhd [1994] 3 AMR 49:2592 (folld)

Malayan Banking Bhd v Siong Electronic Industries (1981) Sdn Bhd [1994] 1 MLJ 704 (overd)

Maxwell v Murphy (1957) 96 CLR 261 (refd)

Ramanathan Chettiar v Lakshmanan Chettiar [1963] 1 Mad LJ 46 (refd)

West v Gwynne [1911] 2 Ch 1 (refd)

Yew Bon Tew v Kenderaan Bas Mara [1983] 1 MLJ 1 (folld)

Legislation referred to

Public Authorities Protection Ordinance 1948 s 2

Rules of the High Court 1980 O 29 r 1(2B), (2C), O 32 r 13

Appeal from: Civil Suit No 22–72–1993 (High Court, Pulau Pinang)

Gooi Hock Seng (*Shan & Gooi*) for the appellants.

Mureli Navaratnam (*Ghazi & Lim*) for the respondent.

Cur Adv Vult

Gopal Sri Ram JCA (delivering the judgment of the court):

Introduction

This appeal has been brought against the order of Vincent Ng J, made on 27 June 1994 whereby he dissolved an injunction obtained ex parte by the appellant on 11 March 1993. We heard this appeal on 9 January 1995, and

A at the conclusion of argument allowed it, at which time it was indicated to counsel before us that written reasons for our decision would be given. This we now do.

The facts

B The facts of the case are these. The appellants are members of the respondent society. On 28 January 1993, the appellants received a letter dated two days earlier from the respondent stating that the former had been suspended from their membership of the latter's board with effect from 26 January 1993. That letter also made the appellants aware that any C representation by them touching upon their suspension could be made at the next general meeting of the respondent. A letter dated 23 February 1993 from the respondent informed the appellants that the annual general meeting of the respondent was scheduled for 14 March 1993.

On 5 March 1993, the appellants took out a writ claiming, inter alia, for a declaration that their suspension was invalid and on the same date D moved the court ex parte, and obtained, an interlocutory injunction restraining the respondent from reporting the appellants' suspension or enforcing it at the then forthcoming general meeting of the respondent of 14 March 1993. On 13 March 1993, the respondent took out a summons to set aside the ex parte order. That application came up for hearing on E 28 March 1994, after an unexplained delay of more than a year. It was then adjourned to 26 April 1994 and again to 27 June 1994, when it was finally heard and granted.

The judgment

F The only ground upon which the injunction was dissolved was that it had lapsed by effluxion of time by reason of the alleged retroactive effect of O 29 r 1(2B) of of the Rules of the High Court 1980 which came into effect on 1 October 1993, about seven months after the injunction had been obtained and which provides as follows:

G > Unless sooner revoked or set aside, an interim injunction obtained on an ex-parte application shall automatically lapse at the end of two weeks from the date on which it was granted.

A second argument mounted by the respondent on O 29 r 1(2C) was rejected by the learned judge on the ground that the injunction did not H restrain the holding or progress of the scheduled general meeting. For completeness we produce r 1(2C) which is in the following terms:

> Notwithstanding paragraph (2) of this rule, a Judge shall not grant an injunction on an ex-parte application if the effect is to stop the holding or progress of a meeting of a body corporate, a society, an association, a union, an organisation, a club or a body of persons whatsoever named.

I

The reasoning of the judge for the conclusion reached by him is expressed in the following two paragraphs of his written judgment:

> Formerly, ex parte injunctions were invariably expressed to last until further order or until trial of the action. The effect of the new amending provision

in O 29 r 1(2B) should be construed as merely fixing, in a definitive manner, the life period of such injunctions. The life-span of an ex-parte injunction granted in equity by the exercise of the court's direction (sic) must essentially be a matter of procedure rather than substantive law or substantive right, as there is nothing to preclude the plaintiff (under the new rules) from repeatedly obtaining consecutive 14-day ex parte injunctions while maintaining his initial cause of action as the common anchor-basis for such repeated ex parte injunctions. The general rule that amending provisions are prospective in its operations does not apply in cases of legislation dealing with procedure or evidence in criminal as well as civil proceedings; the latter being retrospective in its operation unless otherwise provided by clear words. This ought to be so, as no person could have, in law, any vested interest in the course of a procedure or rules of evidence which is changed. His only vested right is in his cause of action or defence or continuance of same.

Thus, as paras 2B and 2C of r 1 are clearly and exclusively procedural in nature, and they do not affect a plaintiff's right, privilege or cause of action acquired or accrued before the amendment, I was of the considered view that both paras 2B and 2C of r 1 should apply retrospectively. Thus, I rule that para 2B was clearly applicable to the facts of our current case, and found that the said injunction had lapsed after the expiry of 14 days from 11 March 1993.

The learned judge drew support for his aforesaid conclusion from a number of authorities of which we only mention *Malayan Banking Bhd v Siong Electronic Industries (1981) Sdn Bhd* [1994] 1 MLJ 704, a decision of Zakaria Yatim J in which he held that the amendment made to the Rules of the High Court 1980 by O 32 r 13 applied retrospectively.

The appeal

Before us, counsel for the respondent attempted a valiant defence of the judge's conclusion on the law. However in the light of the correct legal principles that are to be applied to a case like the present appeal, he had to stare defeat in the face. Our reasons for rejecting the submissions of respondent's counsel (which in reality was a repetition of the justification advanced by the judge for his decision) and for reversing the judge, will appear in a moment. But first it is necessary for us to say a few words about the nature of the appeal before us. This is a case where the judge dissolved an injunction on a pure point of law. We are, therefore, in as good a position as the judge to decide upon the matter with no compulsion to defer to an exercise of discretion based upon evidential material.

Retrospectivity

The traditional approach to the interpretation of statutes (which includes subsidiary legislation such as the Rules of the High Court 1980) in this area is contained in the general rule that, in the absence of express words or necessary implication, statutes affecting substantive rights are prospective while those affecting procedure are retrospective. In the case of rules of court, there is a rider to the general proposition. It is this. A rule of court should not be given an interpretation that would result in unfairness or

A produce a manifest injustice: *Bank of America v Chai Yen* [1981] 1 MLJ 198 at p 199 (an authority not cited to the judge or to us by either side).

Another way of stating the rule is to say that a construction against retrospectivity is placed on a statute to save vested rights but not existing rights: *West v Gwynne* [1911] 2 Ch 1 at pp 11 and 12. But the rule, though B easily stated in its different forms, is difficult in its application to a particular case. And it has been said that resort to such nomenclature as 'vested' and 'existing' is not particularly helpful in resolving difficulties: *Gardner & Co Ltd v Cone & Anor* [1928] All ER 458 at p 461.

The classification of a statute in general terms as procedural or C substantive is singularly unhelpful; for a statute may at once be procedural for one purpose and substantive for another, depending upon the context in which it is being construed: *Maxwell v Murphy* (1957) 96 CLR 261; *In the Estate of Fuld (No 3)* [1968] P 675 at p 695; [1965] 3 All ER 776 at 779; [1966] 2 WLR 717 at p 734 per Scarman J; *Re Dosabhai Ardeshir Cooper* (1950) 52 Bom LR 625. It calls for a construction of the statutory D provision as a whole: *Ramanathan Chettiar v Lakshmanan Chettiar* [1963] 1 Mad LJ 46 at p 50.

In our judgment, the correct test to be applied to determine whether a written law is prospective or retrospective is to first ascertain whether it would affect substantive rights if applied retrospectively. If it would, then, E prima facie that law must be construed as having prospective effect only, unless there is a clear indication in the enactment that it is in any event to have retrospectivity. Contra, where the written law does not affect substantive rights.

We derive support for the view that we have expressed from the decision of the Privy Council in *Yew Bon Tew v Kenderaan Bas Mara* F [1983] 1 AC 553 (also reported in [1983] 1 MLJ 1). It was not referred to by either side to the learned judge in the present case. Neither is it mentioned in *Malayan Banking Bhd v Siong Electronic Industries (1981) Sdn Bhd* which commended itself to the judge and appears to have greatly influenced him in coming to the conclusion that he did.

G In *Yew Bon Tew*, the plaintiff was injured in a collision involving the defendant's vehicle. The accident occurred on 5 April 1972. The relevant time limit for instituting proceedings against the defendant was prescribed by s 2 of the Public Authorities Protection Ordinance 1948. As at the date of the collision, the section provided a period of 12 months. The plaintiff H did not commence any action within the prescribed period. On 5 June 1974, that is to say a little more than two years after the collision and about a year after time had run against the plaintiff, Parliament enacted an amendment to the principal statute, extending the period of limitation to 36 months. On 20 March 1975, the plaintiff issued writ claiming damages for the injuries received by him in the collision of 5 April 1972. At the trial, I the defendant raised a preliminary objection on the maintainability of the action. Mohd Azmi J ruled in the plaintiff's favour. The defendant appealed to the Federal Court which allowed the appeal and dismissed the suit. The plaintiff then appealed to the Privy Council which upheld the Federal Court and dismissed the appeal. Because of its importance it is necessary

to refer in extenso to the advice of the Board which was on that occasion delivered by Lord Brightman. This is what he said ([1983] 1 AC 553 at pp 558–559; [1983] 1 MLJ 1 at pp 2–3):

> A statute of limitations may be described either as procedural or as substantive. For example, in English law, at the expiration of the period prescribed for any person to bring an action to recover land, the title of that person to the land is extinguished. Such a limitation therefore goes to the cause of action itself. In most cases however the English Limitation Act only takes away the remedies by action or by set-off; it goes only to the conduct of the suit; it leaves the claimant's right otherwise untouched in theory so that, in the case of a debt, if the statute-barred creditor has any means of enforcing his claim other than by action or set-off, the Act does not prevent his recovering by those means. In this sense, the Ordinance of 1948 and the Act of 1974 are procedural: cf *Harris v Quine* (1869) LR 4 QB 653 and *Rodriguez v RJ Parker (Male)* [1967] 1 QB 116.
>
> Apart from the provisions of the interpretation statutes, there is at common law a prima facie rule of construction that a statute should not be interpreted retrospectively so as to impair an existing right or obligation unless that result is unavoidable on the language used. A statute is retrospective if it takes away or impairs a vested right acquired under existing laws, or creates a new obligation, or imposes a new duty, or attaches a new disability, in regard to events already past. There is, however, said to be an exception in the case of a statute which is purely procedural, because no person has a vested right in any particular course of procedure, but only a right to prosecute or defend a suit according to the rules for the conduct of an action for the time being prescribed.
>
> *But these expressions 'retrospective' and 'procedural', though useful in a particular context, are equivocal and therefore can be misleading. A statute which is retrospective in relation to one aspect of a case (eg because it applies to a pre-statute cause of action) may at the same time be prospective in relation to another aspect of the same case (eg because it applies only to the post-statute commencement of proceedings to enforce that cause of action); and an Act which is procedural in one sense may in particular circumstances do far more than regulate the course of proceedings, because it may, on one interpretation, revive or destroy the cause of action itself.* (Emphasis added).

Later in his judgment he reiterated ([1983] 1 AC 553 at p 563; [1983] 1 MLJ 1 at p 5):

> *Their Lordships consider that the proper approach to the construction of the Act of 1974 is not to decide what label to apply to it, procedural or otherwise but to see whether the statute, if applied retrospectively to a particular type of case, would impair existing rights and obligations.* (Emphasis added.)

I have laid emphasis on these last two passages because in them is the key to the whole problem that is now under investigation. It is an approach that was overlooked by the judge in the instant case.

In *Jeou-Shun Industrial Co Ltd v Shuang Hor Enterprise (M) Sdn Bhd* [1994] 3 AMR 49:2592, Zakaria Yatim J was confronted with the same question that arose before the learned judge in the instant case He held that r 1(2B) was prospective and therefore did not affect the ex parte injunction that the plaintiff had obtained in that case. The authorities that

A were cited by Zakaria Yatim J in support of his conclusion included the decision of the Privy Council in *Yew Bon Tew*.

We cite with approval, and respectfully adopt as our own, the following view expressed by Zakaria Yatim J in *Jeou-Shun*:

> B It is axiomatic that the power of the court to grant an injunction can only be exercised in support of a right which the plaintiff has or at any time for interlocutory purposes, shown that he probably has such right. See *Fennbend Ltd v Millar* (1988) 20 HLR 19 at p 22. Mr Wong Sai Fong rightly submitted that the plaintiff's right was protected and preserved under the ex parte order until the order is set aside.
>
> C In my view, the plaintiff, by filing a writ and statement of claim and by obtaining the ex parte order had a vested right prior to the amendment, and the amendment therefore should not affect such right. In the absence of any express words in the new r 1(2B) of O 29 that it should apply retrospectively, the ex parte order therefore must be construed to apply prospectively.
>
> D The position at common law is also the same. In *Malayan Banking Bhd v Siong Electronic*, I said, after considering the relevant authorities, that an amending statute could not be construed retrospectively if it affected any right that existed before the amendment. If the amending statute had the effect of altering a substantive law or removing a substantive right, it should not also be construed retrospectively.

E *Conclusion*

When the appellants obtained the ex parte injunction on 5 March 1993, they had a legitimate expectation that their injunction would continue until set aside on merits and that it would not lapse by mere effluxion of time. In the instant case, to give r 1(2B) an interpretation so as to lend it F retrospectivity would result in the destruction of the right protected by the injunction.

To hold otherwise would produce absurd results. Take this very case. Assume for a moment that one month after the grant of the injunction the respondent defied it and its officers had been punished for contempt. According to the reasoning of the judge, once r 1(2B) came into effect the G injunction had ceased to have had any effect at the end of two weeks from the date of its grant. Therefore, the officers of the respondent had committed no contempt. Yet they would, on the assumption made earlier, have been found guilty and sentenced for disobeying a non-existent order. And would it be then have been a defence for them to say that at some time in H the future the Rules of the High Court 1980 may be amended to nullify nunc pro tunc the order they openly defied? And what crystal ball is to be used to achieve this miracle? The bizarre consequences that would result from an acceptance of the judge's reasoning shows that he was wrong.

The answer afforded by the learned judge to the rather hapless I plaintiff in all such cases as the present, namely, that he may 'repeatedly obtain consecutive 14-day injunctions while maintaining his initial cause of action as the common anchor basis for such repeated ex parte injunctions' is a *non sequitur* and provides the appellants with but empty comfort. Following the judge's reasoning, it is difficult to understand how the

appellants in the instant case could have foreseen the retrospective amendment to O 29 on 25 March 1993 (when according to the judge the injunction automatically expired) and then instantaneously moved for another ex parte injunction.

In our judgment, the amendments introduced to the Rules of the High Court 1980, by Gazette Notification PU(A) 364/93 should not be construed as retrospective provisions. There is certainly no compulsion in their language requiring such a construction.

It follows from what we have said that the judge in this case, as well as Zakaria Yatim J in *Malayan Banking*, fell into the same error as the trial judge in *Yew Bon Tew* by merely confining themselves to labels without undertaking a more meaningful examination of the nature of the amendments and their true purport. For my part, I am satisfied that, deprived as he was of the advice of the Judicial Committee in *Yew Bon Tew* and the other authorities preceding it, the judge in this case wrongly classified r 1(2B) of O 29 as being merely procedural. For the like reason, *Malayan Banking* was also wrongly decided and must be overruled.

The approach that we have taken makes it unnecessary for us to deal with the judge's rejection of the argument that the injunction infringed r 1(2C) as well.

The result

For the reasons given in this judgment, we allowed the appeal, restored the injunction and remitted the respondents' summons to the learned judge with a direction that he considers it upon its merits. The respondent was also ordered to pay the costs of the appeal and the costs incurred in the court below. The security deposit paid into court by the appellants was ordered to be refunded to them.

Shaik Daud JCA: I have had the advantage of reading the draft of the judgment in this matter of Gopal Sri Ram JCA which is in accord with my own reasoning for arriving at the conclusion we arrived at.

VC George JCA: I have had the advantage of reading the draft of the judgment in this matter of Gopal Sri Ram JCA which is in accord with my own reasoning for arriving at the conclusion we arrived at.

Appeal allowed.

Reported by Anne Khoo